FILED
FEB 7 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 77-1287

Jack Lee Fisher, Appellant

vs.

The State of Ohio, Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

HOWARD S. ZWELLING
Attorney for Appellant
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

I N D E X

Page

INDEX i

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

OPINIONS.....1

GROUNDS OF JURISDICTION OF SUPREME COURT.....1, 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE .....3 - 6

SUBSTANTIALITY OF FEDERAL QUESTIONS .....7 - 8

CONCLUSION 9

ACKNOWLEDGEMENT OF SERVICE 10

APPENDIX A - Entry of the Supreme Court of the State of Ohio Dismissing Appellant's Appeal and overruling Motion for Leave to Appeal

APPENDIX B - Memorandum and Judgment Entry of the Court of Appeals, Fifth District, Muskingum County, Ohio

APPENDIX C - Judgment Entry of Court of Common Pleas of Muskingum County, Ohio, Denying Motion for New Trial

APPENDIX D - Common Pleas Court of Muskingum County, Ohio, Opinion of The Honorable, Richard D. Hixson, Judge

APPENDIX E - Defendant's Notice of Appeal to the Supreme Court of the State of Ohio-Dated: June 14, 1977

APPENDIX F - Defendant's Notice of Appeal to the Court of Appeals of Muskingum County, Fifth Appellate District From sentence and Judgment of Court of Common Pleas of Muskingum County, Ohio, Dated: October 20, 1976

APPENDIX G - Appellant's Notice of Appeal to The Supreme Court of the United States from the Supreme Court of the State of Ohio, Dated: December 22, 1977

STIPULATION 11

TABLE OF AUTHORITIES

Page

BROOKS V TEXAS, 381 F2d, 619 (CA 5 1967).....8

COFFIN V UNITED STATES, 156 U.S. 432, 15 S. Ct. 394.....2

DEUTCH V UNITED STATES, 367, U.S. 456, 6 L Ed. 2d 963, 81 S. Ct.....2

ESTELLE V WILLIAMS, 425 U.S. 501, 48 L ed 126.....7

GAITO V BRIERLEY, 485 F 2d 86 (CA 3 1973).....8

IRVIN V DOWD, 366 U.S. 717, 6 L. ed. 2d 751, 81 S. Ct....2 & 7

KENNEDY V CARDWELL, 487 F. 2d 101 (1973).....2

LEEROY MURCHISON AND JOHN WHITE, 349 U.S. 133, 9 L. Ed. 942, 75 S. Ct. 623.....2

MILLER V STATE, 249 Ark 3, 457 S W 2d 48 (1970).....8

RIDEAU V LOUISIANA, 373 U.S. 723, 10 L. Ed. 663, 83 S. Ct. 1417.....2

SINCLAIR V UNITED STATES, 279 U.S. 749, 73 L. Ed. 938.....2

TURNER V LOUISIANA, 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546.....2 & 8

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION...1 & 7

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, Jack Lee Fisher, files this statement of the basis upon which it is contended that the Supreme Court of the United State has jurisdiction to review the Order entered by The Supreme Court of Ohio in this case and should exercise such jurisdiction herein.

OPINIONS

The opinion of The Supreme Court of Ohio is unreported and is attached hereto as, Appendix A, Pages 1 and 2. The Court of Appeals decision is also attached as, Appendix B, Pages 1 through 7. The Common Pleas Court decision is attached as, Appendix C, and the Opinion of The Honorable, Richard D. Hixson is attached as, Appendix D, Pages 1 through 3.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to determine whether the appellant was denied due process of law consistent with the Fourteenth Amendment and whether he was granted equal protection under the law.

The Order of The Supreme Court of Ohio was entered on September 29, 1977. A timely notice of appeal was filed on December 22, 1977, in The Supreme Court of Ohio. The jurisdiction of this Court is invoked

under the provisions of Fourteenth Amendment to the United States Constitution.

Cases that sustain the jurisdiction of this Court include:

Coffin v United States, 156 U.S. 432, 15 S. Ct. 394

Deutch v United States, 367, U.S. 456, 6 L Ed. 2d 963, 81 S. Ct.

Irvin v Dowd, 366 U.S. 717, 6 L. ed. 2d 751, 81 S. Ct.

LeeRoy Murchison and John White, 349 U.S. 133, 9 L. Ed. 942, 75 S. Ct. 623

Rideau v Louisiana, 373 U.S. 723, 10 L. Ed. 663, 83 S. Ct. 1417

Sinclair v United States, 279 U.S. 749, 73 L. Ed. 938

Turner v Louisiana, 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546

Kennedy v Cardwell, 487 F. 2d 101 (1973)

QUESTIONS PRESENTED

Whether the court below ruled properly in failing to recognize a substantial constitutional question as to whether an accused in a criminal case has the right to the indicia of innocence and the presumption of innocence in accordance with due process and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

The case originated in the Common Pleas Court of Muskingum County, Ohio. The defendant was charged with Aggravated Murder. After a mistrial on July 26, 1976 due to appellant's having been brought into the Courtroom in handcuffs before prospective jurors, the matter again proceeded to trial on September 28, 1976.

After both parties rested, the trial recessed for an extended lunch period to allow counsel to review the court's charge, discuss exhibits regarding their admission into evidence, all prior to closing arguments of counsel.

During the recess, six jurors, upon their own volition, engaged themselves upon a tour of the new jail facility adjacent to the Courthouse. Touring the jail, two jurors viewed the appellant in a jail cell where he was awaiting his return for the afternoon court session. Appellant, behind bars was attired in the same street clothes which he had been wearing during the course of the trial.

Upon resumption of the afternoon session, the defense moved for a mistrial. In the trial transcript, the following appears at Page 315, lines 24 through Page 316, lines 1 through 19:

> "MR. ZWELLING: Yes, Your Honor. At this time, I would move the Court for a mistrial. It's been called to my attention that during the noon hour some of the members of the jury panel were taken on a tour of the Muskingum County Jail, and that the cell in which Mr. Fisher was located at the time was pointed out to these jurors, and I believe

> that at least two of the jurors actually saw Mr. Fisher in that jail. This is highly prejudicial, even in view of the fact that he did testify that he was unable to post bond, and that he was -- has been in the Muskingum County Jail for six months. It's one thing for them to have that testimony. It's another thing to see him in a cell, and that would be highly prejudicial, and therefore, there should be a mistrial. Now, I would like the opportunity, if the Court would allow, to question the jurors at some time and to question the jailer Larry Paul, and possibly any other deputies who were in on the tour as to this issue in support of my motion."...

The Court overruled the defendant's motion at Page 317 of the Transcript, lines 7 through 12:

> "COURT: At this point, there's no further evidence relating to this incident. The Court would overrule the motion for mistrial, afford the defendant an opportunity to continue with the case, be afforded an opportunity to make a record in this case."...

The jury then received the case and rendered a verdict of not guilty of aggravated murder but guilty of murder.

The court permitted counsel to make a record of the incident in question and the following is the testimony of the Deputy Sheriff who conducted the jurors through the jail and the jurors who actually saw the defendant. Transcript, Page 383, line 23 through Page 386, line 8:

> "By Mr. Zwelling:
> Q State your name please.
> A Larry Paul.
> Q You were just sworn to testify?
> A Yes sir.
> Q And what is your occupation?
> A Deputy sheriff.

Q And what is your position as a deputy sheriff?
A Warden, Muskingum County Jail.
Q Were you on duty this -- I believe 30th day of September, 1976?
A Yes sir.
Q And were you there during the noon hour between the hours of 11 and 1 or 1:30?
A Yes sir.
Q And during that time, did you have occasion to have any visitors whom you know to be members of a jury panel in the case of the State of Ohio -vs- Jack Lee Fisher, which is currently on trial?
A I had a tour, yes sir.
Q Okay. What people were members of that tour?
A I can only name you one. It was Terry Bell.
Q And did you know her to be a member of that --
A I knowed she was called for jury duty.
Q Now, exactly what did the tour consist of?
A Of the tour of the booking room and into the front corridor of the jail.
Q The corridor of the jail, just exactly what can you see from there?
A You can see the visiting rooms, the padded cell, the attorneys' rooms, the drunk tank door.
Q Can you see the cell block doors?
A You can see the cell block doors.
Q There are windows in the cell block?
A Yes.
Q Is there a window into the drunk tank?
A Yes sir.
Q And you took them all through that corridor past these various doors and windows?
A Yes sir.
Q Was any statement made as to where Jack Fisher was at this time?
A Yes sir, for the reason that I didn't want them to look into the drunk tank.
Q Okay. And you say he was in the drunk tank?
A Yes sir.
Q Just exactly what, if you can remember, were your words to these people?
A Just that Mr. Fisher was in there waiting to go back to court.
Q And you referred to in there as being the

drunk tank?
A Yes sir.
Q How many were in this tour?
A Approximately six to seven.
Q Now, did you have an opportunity to observe all of them every minute, every second of that tour?
A No sir. They was all right there together in one group, yes sir.
Q So you don't know whether anybody looked in the window of the drunk tank or not?
A No sir."...

The defendant appealed his case to the Fifth District Court of Appeals of Muskingum County, Ohio, On October 20, 1976. Oral argument was heard on April 19, 1977. The Court of Appeals rendered its opinion denying the defendant's appeal on May 26, 1977. See Appendix B.

Appeal to The Supreme Court of Ohio was filed June 14, 1977. See Appendix E.

On September 29, 1977, The Supreme Court of Ohio decided that no substantial constitutional question existed and consequently refused to hear the case. See Appendix A.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that the Fourteenth Amendment to the United States Constitution provides:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law;"

It has been established in the case of Irvin v Dowd, 366 U.S. 717 6 L ed 751 at Page 752, in the headnotes:

> "A juror's verdict must be based upon the evidence developed at the trial of a criminal prosecution, regardless..."

and in the case of Estelle v Williams, 425 U.S. 501, 48 L ed 126, decided May 3, 1976, a case involving a trial of an accused, attired during the trial in prison garb, though deciding against the petitioner due to failure of his attorney to establish an objection on the record, the court established at 48 L ed at pp. 127, 128, footnotes:

> "The presumption of innocence, although not articulated in the Constitution of the United States, is a basic component of a fair trial under the United States' system of criminal justice. To implement the presumption of innocence, courts must be alert to factors that may undermine the fairness of the fact-finding process; in the administration of criminal justice, courts must carefully guard dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."

Courts have, with few exceptions, determined that an accused should not be compelled to go to

trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. Gaito v Brierley, 485 F 2d 86 (CA 3 1973);

Brooks v Texas 381 F2d, 619 (CA 5 1967)

Miller v State 249 Ark 3, 457 S W 2d 48 (1970)

These cases are a reminder of the principle that the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgement. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play. Turner v Louisiana, 379 U.S. 466, 13 L Ed 2d 424 (1965).

To allow members of a jury to view the defendant behind bars in a cell prior to deliberating the case certainly raises questions beyond that of jury viewing the defendant in prison garb or handcuffs and raises a most substantial question of denial of due process as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court substantial and important federal, constitutional questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated: January 6, 1978.

Respectfully submitted,

HOWARD S. ZWELLING
Attorney for Appellant
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

ACKNOWLEDGEMENT OF SERVICE

I, Richard E. Bridwell, Muskingum County Prosecuting Attorney, the attorney of record for The State of Ohio, the Appellee herein, hereby acknowledge that I was served and received a copy of the foregoing Jurisdictional Statement and attached Appendices, on March 9, 1978.

Richard E. Bridwell,
Counsel for Appellee

All parties required to be served have been served.

Dated: March 9, 1978.

Howard S. Zwelling
Counsel for Appellant
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

IN THE SUPREME COURT OF THE UNITED STATES

Jack Lee Fisher :

Appellant :

vs. : No. _____

The State of Ohio :

Appellee :

STIPULATION AS TO CONTENTS OF APPENDIX

Pursuant to Rule 36(2) of the Revised Rules of the Supreme Court of the United States, Jack Lee Fisher and The State of Ohio, who are the parties in the above-entitled proceeding, hereby stipulate and agree, by their attorneys of record, that the appendix to the Jurisdictional Statement of Jack Lee Fisher, the above-named appellant, are true as printed verbatim.

Dated: March 9, 1978.

HOWARD S. ZWELLING
Attorney for Appellant
Howard S. Zwelling
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

RICHARD E. BRIDWELL
Attorney for Appellee
R E Bridwell
28 N. Fourth Street
Zanesville, Ohio 43701
(614) 454-0111

CERTIFICATE OF SERVICE
PERSONAL SERVICE

I, Howard S. Zwelling, a member of the Bar of the Supreme Court of the United States and counsel of record for Jack Lee Fisher, Appellant herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein, as follows:

On, Richard E. Bridwell, Muskingum County Prosecuting Attorney, counsel for Appellee herein, by delivering the copies thereof to his office located at 28 N. Fourth Street, Zanesville, Ohio 43701, on the 30th day of January, 1978.

All parties required to be served have been served.

Dated: January 30, 1978.

HOWARD S. ZWELLING
Attorney for Appellant
Howard S. Zwelling
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

APPENDIX A

ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING APPELLANT'S APPEAL, AND OVERRULING MOTION FOR LEAVE TO APPEAL.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO]
City of Columbus]

1977 TERM
To wit: September 29, 1977

State of Ohio, Appellee,
vs.
Jack Lee Fisher, Appellant

No. 77-865
MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for MUSKINGUM County

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION
ONLY
NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19____.

_____
Clerk

_____ Deputy

APPENDIX B

MEMORANDUM AND JUDGMENT ENTRY OF THE COURT OF APPEALS, FIFTH DISTRICT, MUSKINGUM COUNTY, OHIO, DATED: MAY 26, 1977

IN THE COURT OF APPEALS, FIFTH DISTRICT
MUSKINGUM COUNTY, OHIO

STATE OF OHIO	:	JUDGES:
PLAINTIFF-APPELLEE	:	Hon. Leland Rutherford, P.J.
vs.	:	Hon. Norman J. Putman, J.
JACK LEE FISHER	:	Hon. David D. Dowd, Jr., J.
DEFENDANT-APPELLANT	:	M E M O
	:	CASE NO. CA 76-32
	:	Decided: _____

APPEARANCES:

RICHARD E. BRIDWELL
Prosecuting Attorney
28 North Fourth Street
Zanesville, Ohio 43701

ATTORNEY FOR PLAINTIFF-APPELLEE

HOWARD S. ZWELLING
421 Main Street
Zanesville, Ohio 43701

ATTORNEY FOR DEFENDANT-APPELLANT

IN THE COURT OF APPEALS, FIFTH DISTRICT

MUSKINGUM COUNTY, OHIO

STATE OF OHIO	:	
PLAINTIFF-APPELLEE	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA-76-32
JACK LEE FISHER	:	(FILED: May 26, 1977)
DEFENDANT-APPELLANT	:	

For the reasons stated in the memorandum on file, all four assigned errors are overruled, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed and this cause is remanded to that court for the execution of sentence.

/s/ Norman J. Putman

/s/ David D. Dowd

/s/ Ieland Rutherford

JUDGES.

PUTMAN, J.

The appellant (Fisher) was indicted for aggravated murder (R.C. 2903.01) but was acquitted of that crime and convicted of the lesser offense of murder (R.C. 2903.02). Sentenced by the Court of Common Pleas of Muskingum County he appeals assigning four errors. Each is overruled for reasons which follow.

I.

We find no prejudicial error in the overruling by the trial court of defendant's motion for a mistrial made after the jury had retired to deliberate. The basis of the mistrial motion was the revelation that six of the jurors during the lunch hour after the close of testimony and before oral argument and deliberation, had visited the jail entirely of their own volition. There they saw the accused in jail. It is clear from the record that the lawyers had no knowledge of and took no part it it. Apparently the jury did this in much the same manner as they might have visited a department store. We find no resulting prejudice to the accused on the record in this case. He testified (R. 280) in his trial which began September 28, 1976, that he had been and presently was confined in that jail continuously since April 1st of that year, a

period of approximately six months, and that he had been in jail before several times for substantial periods and in several different states. (See R. 284, 285, 286, and 287).

II.

We find no error in the refusal of the trial court to direct a verdict of acquittal for the crime of aggravated murder. We find sufficient evidence of prior calculation and design to take the case to the jury on that crime. The evidence is clear that there was bad blood between the victim and the defendant for a long time and specifically for two weeks prior to the crime (R. 45, 46, R. 101, 128, 124, 125, R. 261-262); that before the killing the accused had made a declaration about getting a gun and "then we'll see who shoots who"; this before he crossed the room to where the fatal gun was located (R. 18). Additionally, there was a prior threat of the defendant to kill the victim made earlier in the day of the killing (R. 45).

III.

The third assignment of error claims that there was a violation of the separation of witnesses rule which

occurred when the state sent its secret service officer out to contact a civilian witness who had testified for the state in its case in chief and to summon him to testify in rebuttal of the defense claim that the civilian witness had wiped the fingerprints off the gun and placed the gun near the victim's hand. The defendant denied that he had done these acts. All the record shows is that there was an apparent misunderstanding by the civilian lay-witness about the significance of the word "testimony". The trial court had an evidentiary hearing on this subject in the absence of the jury and resolved the matter favorably to the state. We find no support in the record for any claim of error or abuse of discretion on the part of the trial court with respect to this subject.

IV.

The fourth assignment of error claims that the court should have instructed the jury on the lesser included offense of involuntary manslaughter while in the commission of a misdemeanor, R.C. 2903.04(B). The misdemeanor claimed in support of this assignment of error, is a section of the Zanesville Code which was not made a part of the record but which in the brief appears to be Zanesville Ordinance No.

549.12 providing that "no person shall discharge any.... firearm within the corporate limits of the municipality". This assignment of error is without merit. The defendant took the stand and testified that he had gone to the mantle shelf where he intended to reach up for a gun which he merely wanted to borrow and that when he did so "it just exploded, I don't know what happened". He declared that he did not "touch the triger or the cocker, either one". The defendant's claim, if believed, is a complete defense to any crime charged in the indictment and is not consistent in any event with a conviction of involuntary manslaughter while committing a misdemeanor. The section of the Zanesville Ordinace requires for its violation an intent to discharge a firearm which said intent the defendant specifically denied.

The court did charge on the crime of involuntary manslaughter while committing a felony, R.C. 2903.04 (A), and also on the crime of negligent homicide, R.C. 2903.05, which is a misdemeanor of the first degree, a lesser offense that the crime which the defendant complains the court did not charge in this assignment of error. We have carefully considered the law of this state as laid down by the Supreme Court of Ohio in the Case of State v. Nolton, 19 Ohio St.2d. 133, 135; 249 N.E.2d 797, 799 (1969),

and we are unable to determine, nor has it been explained to us in the appellant's brief or oral argument, how the jury could reasonably find from the evidence in this case considering the testimony of the defendant, that the accused was guilty of committing involuntary manslaughter while intentionally discharging a firearm within the city limits of Zanesville.

For the foregoing reasons, all four assigned errors are overruled, the judgment of the Court of Common Pleas of Muskingum County is affirmed and this cause is remanded to that court for the execution of sentence.

Rutherford, P.J. and
Dowd, J. concur.

/s/ Norman J. Putman
/s/ David D. Dowd
/s/ Leland Rutherford
JUDGES.

APPENDIX C

JUDGMENT ENTRY OF COURT OF COMMON PLEAS OF MUSKINGUM COUNTY, OHIO, DENYING MOTION BY DEFENDANT FOR NEW TRIAL DATED: October 13, 1976:

COURT OF COMMON PLEAS OF MUSKINGUM COUNTY, OHIO

JUDGMENT ENTRY

STATE OF OHIO

Plaintiff

vs.

JACK LEE FISHER

Defendant

Case No..C76-48 . .

Journal Vol. Page

Date of Entry , 19__

This matter coming on before the Court on the 7th day of October, 1976, for hearing on the Motion for a New Trial filed by the Defendant herein dated October 5, 1976, the Defendant being present and represented by Attorney Howard S. Zwelling, the Court having considered the arguments of counsel for the Defendant and the State of Ohio, and for the reasons stated in the Opinion of this Court filed herein October 8, 1976, setting forth findings of fact and conclusion of law pertaining thereto,

IT IS, THEREFORE, the ORDER of this Court that the Motion by the Defendant for a New Trial is denied.

/s/ Richard D. Hixson

JUDGE

JOSEPH E. HILDEBRAND, Clerk of Courts

APPENDIX D (Page 1 of 3)

COMMON PLEAS COURT OF MUSKINGUM COUNTY, OHIO, OPINION OF THE HONORABLE, RICHARD D. HIXSON, JUDGE. DATED: OCTOBER 8, 1976

IN THE COMMON PLEAS COURT OF MUSKINGUM COUNTY, OHIO

STATE OF OHIO

VS

JACK LEE FISHER No. C76-48

O P I N I O N

Defendant, by his counsel, filed his motion for a new trial pursuant to Criminal Rule 33 (A)(2) on grounds of jury misconduct.

The defendant raised the question of possible jury misconduct immediately before counsel began closing arguments by a motion for mistrial. The court denied the motion for mistrial. The court denied the motion for mistrial and permitted the trial to continue.

Following the announcement of the jury's verdict, the court made inquiry of the jury panel and learned that at the lunch break of the final day of trial, six members of the jury panel requested and were taken on a tour of the newly constructed Muskingum County Jail. At the request of defendant's attorney, the six jurors were summoned for a hearing to inquire of them regarding the incident.

The testimony of the six jurors was that one of their number had been involved in the construction of the jail which was placed in use in January, 1976. That upon returning from lunch, approximately one-half hour before court was to re-convene, one of them suggested a tour of the jail. Upon their own initiative they rode the elevator to the fourth floor jail complex and received a tour by a sheriff's deputy.

The testimony established that the visitation was juror initiated and was motivated out of curiosity about the new building shared by many others in the community. While touring the jail, a deputy sheriff pointed out that the defendant was confined in the drunk tank during the noon recess. Two jurors stated they saw the defendant wearing civilian clothing sitting in the cell.

The jurors stated they knew the defendant was and had been incarcerated in the county jail since April 1, 1976, because of the defendant's testimony on direct examination in answer to a question by his counsel. All of the jurors stated that the visit to the jail and observing the defendant and hearing his name in no way affected their vote.

The court finds that in this case the visit to the jail by the jurors was by their own volition and was in no way connected with any law enforcement officers. Further that there was no evidence of a discussion of the evidence or the defendant by the jurors either among themselves or with any persons in the jail and that it was an inadvertent occurence.

In this case the jury was aware of the defendant's incarceration by his own statement offered to the jury in his direct testimony. Thus, the fact of incarceration was already known to the jurors by defendant's choice.

Chief Justice Burger writing the majority opinion in Estelle vs. Williams, 48 L. Ed. 2d 126 (1976) referring to United States, ex rel Stahl vs. Henderson 472 F 2d 556, states at page 132,

> "No prejudice can result from seeing that which is already known."

The situation there involved a defendant being tried for an offense committed in confinement and was being tried in prison garb. The theory being that no prejudice could arise to

such a defendant from being tried in prison garb because the jury would have known of his incarceration.

In the present case the defendant chose to make the fact of his incarceration known to the jury as a part of his testimony, perhaps as a strategy to invoke sympathy. Regardless of the reason the jury learned of his incarceration because he elected to tell them.

In Wright vs. Texas, 533 F 2d 185 (1976) it was held that an inadvertent view by jurors of an accused in handcuffs requires an affirmative showing of prejudice by the defendant before conviction will be disturbed.

The defendant's authorities relate well established principles of law but only the dissenting opinion in Estelle arises from a case similar to ours. There are distinguishing facts in Estelle from ours, particularly the question of inadvertance and prior knowledge emanating from the defendant.

For these reasons the court finds that it does not affirmatively appear from the evidence that the defendant was prejudiced by the inadvertent incident resulting in the brief sighting of the defendant by two jurors.

Therefore the defendant's motion for a new trial is denied.

/s/ Richard D. Hixson
Judge

APPENDIX E

DEFENDANT'S NOTICE OF APPEAL IN THE COURT OF APPEALS, MUSKINGUM COUNTY, OHIO TO THE SUPREME COURT OF THE STATE OF OHIO, DATED: JUNE 14, 1977:

IN THE COURT OF APPEALS, MUSKINGUM COUNTY, OHIO

State of Ohio)
Plaintiff-Appellee)
vs.) Case No. 76-32
Jack Lee Fisher)
Defendant-Appellant) NOTICE OF APPEAL

Jack Lee Fisher, indigent, by and through his court-appointed counsel, hereby files his Notice of Appeal in the Court of Appeals, Fifth District for Muskingum County, Ohio, from a Judgment entered on May 26, 1977. The case originated in the Common Pleas Court of Muskingum County, Ohio, and was appealed from that Court to the Court of Appeals, Fifth District, Muskingum County, Ohio.

The Appellant now appeals to the Supreme Court of the State of Ohio on the basis of alleged errors in the conduct of his original trial, which involves substantial constitutional questions.

Respectfully submitted,

HOWARD S. ZWELLING
Attorney for Defendant-Appellant

/s/ Howard S. Zwelling
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

APPENDIX F

DEFENDANT'S NOTICE OF APPEAL TO THE COURT OF APPEALS OF MUSKINGUM COUNTY, FIFTH APPELLATE DISTRICT FROM SENTENCE AND JUDGMENT OF COURT OF COMMON PLEAS OF MUSKINGUM COUNTY, OHIO, DATED: OCTOBER 20, 1976:

IN THE COURT OF COMMON PLEAS, MUSKINGUM COUNTY, OHIO

The State of Ohio :
Plaintiff :
vs. : Case No. C76-48
Jack Lee Fisher :
Defendant : NOTICE OF APPEAL

Take notice that defendant, Jack Lee Fisher, hereby appeals to the Court of Appeals of Muskingum County, Ohio 5th Appellate District, from the sentence and judgment entered by the Court of Common Pleas of Muskingum, Ohio, in the above entitled cause on the 13th day of October, 1976.

/s/ Howard S. Zwelling
HOWARD S. ZWELLING
421 Main St.
Zanesville, Ohio 43701
452-8426
Attorney for Defendant

SERVICE

Copy of the foregoing notice served on The State of Ohio by mailing copy of same to Richard E. Bridwell, Prosecuting Attorney, 28 N. 4th St., this 20th day of October, 1976.

/s/ Howard S. Zwelling
HOWARD S. ZWELLING

APPENDIX G

APPELLANT'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF OHIO, DATED: December 22, 1977.

IN THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio	:	
Plaintiff-Appellee	:	
vs.	:	Case No. 77-865
Jack Lee Fisher	:	
Defendant-Appellant	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, Jack Lee Fisher, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of the State of Ohio dismissing an appeal from the Court of Appeals of Muskingum County, Ohio, entered in this proceedings on September 29, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1257 on the ground that a privilege or immunity claimed under the Constitution of the United States is involved and that the State Court Decision is against the privilege or immunity claimed.

Dated: December 22, 1977.

HOWARD S. ZWELLING
Attorney for Defendant-Appellant

/s/ Howard S. Zwelling

421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served upon, Richard E. Bridwell, Muskingum County Prosecuting Attorney, at 28 N. Fourth Street, Zanesville, Ohio 43701, by regular U. S. mail, postage prepaid this 22nd day of December, 1977.

/s/ Howard S. Zwelling
Counsel for Defendant-Appellant

Supreme Court, U. S.
FILED
APR 10 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1287

JACK LEE FISHER

Appellant

-vs-

THE STATE OF OHIO

Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM APPEAL

HOWARD S. ZWELLING
Attorney for Appellant
421 Main Street
Zanesville, Ohio 43701
(614) 452-8426

RICHARD E. BRIDWELL
Prosecuting Attorney
Muskingum County, Ohio
28 North Fourth Street
Zanesville, Ohio 43701
(614) 454-0111
Attorney for Appellee

SUBJECT INDEX

	PAGE
TABLE OF AUTHORITIES	1
MOTION TO DISMISS OR AFFIRM APPEAL FROM STATE COURT	2
I STATEMENT OF THE CASE	3
II ARGUMENT	11
III CONCLUSION	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

	PAGE
BROOKINS V. STATE, 354 A. 2d 422 (Del. Sup. Ct. 1976)	15
ESTELLE V. WILLIAMS, 425 U. S. 501, 48 L. Ed. 2d 126 (1976)	11, 12
GONZALES V. BETO, 405 U. S. 1052, 31 L. Ed. 2d 787 (1972)	17
KENNEDY V. CARDWELL, 487 F. 2d 101 (6th Cir. 1973), cert. den. 416 U. S. 959, 40 L. Ed. 2d 310 (1974)	13, 14
STATE V. NEELY, 524 S. W. 2d 886 (Mo. App. 1975)	15
UNITED STATES V. BRUMBAUGH, 471 F. 2d 1128 (6th Cir. 1973), cert. den. 412 U. S. 918, 37 L. Ed. 2d 144, (1973), reh. den. 414 U. S. 1033, 38 L. Ed. 2d 326 (1973)	17
UNITED STATES V. CRANE, 499 F. 2d 1385 (6th Cir. 1974) cert. den. 419 U. S. 1002, 42 L. Ed. 2d 278 (1974)	13, 14
UNITED STATES EX REL STAHL V. HENDERSON, 472 F. 2d 556 (5th Cir. 1973), cert. den. 411 U. S. 971, 36 L. Ed. 2d 694 (1973)	11, 12
UNITED STATES V. LEACH, 429 F. 2d 956 (8th Cir. 1970)	15
WRIGHT V. TEXAS, 553 F. 2d 185 (5th Cir. 1976)	13

MOTION TO DISMISS OR AFFIRM APPEAL FROM STATE COURT

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

STATEMENT OF THE CASE

The Appellant herein, JACK LEE FISHER, was initially charged with Aggravated Murder arising out of events occurring on April 1, 1976. Appellant was arrested that evening and thereafter charged. Following a preliminary hearing held at the Zanesville Municipal Court on April 7, 1976, Appellant was bound over to the Muskingum County Grand Jury, and subsequently indicted on May 18, 1976, upon the single count of Aggravated Murder. Appellant was arraigned on May 24, 1976, and the matter subsequently set for trial.

Trial was scheduled to commence on July 26, 1976, but a mis-trial was declared that date on Appellant's Motion after the Appellant had been brought into the Courtroom in handcuffs before prospective jurors. The matter again proceeded to trial on September 28, 1976. On the third day of trial, the Appellant testified

as to his prior criminal record and present confinement in the Muskingum County Jail.

After both parties rested, the Trial recessed for an extended lunch period to allow time for counsel to review the Court's charge, prior to the closing arguments of counsel. During the recess, six jurors, upon their own volition, engaged themselves upon a tour of the new county building and jail complex, immediately adjacent to the Courthouse, touring the jail, and two jurors did briefly view the Appellant in a jail cell, fully attired in the same street clothes which he had been wearing during the course of the Trial. Upon the resumption of the afternoon proceedings the defense moved for a mis-trial, same being overruled, whereupon the Trial proceeded to its conclusion. The jury, after its deliberations, returned a verdict of not-guilty upon the charge of Aggravated Murder, but guilty of Murder.

Immediately after the reading of the verdict, the Trial Court instructed those jurors involved

in the jail house incident to appear before the Court upon the following Monday for the purpose of giving testimony. On Monday, October 4, 1976, a voir dire examination of six (6) jurors was conducted, two (2) jurors acknowledging that they had viewed the Appellant in the jail cell, but all six (6) jurors affirmatively stating under oath that the brief encounter had in no way influenced their deliberations upon the case, testimony thereof appearing at Pages 396-427 of the Transcript.

Redirect examination of Roger Gibson, at Page 401, lines 23-25 to Page 402, line 1 (Transcript), by Defense Counsel:

"Q. How can you with absolute certainty, Mr. Gibson, I don't want to argue the point, that that positively had no effect on your decision?

A. It just didn't. I mean just no effect at all."

Cross-Examination of Richard Cameron, at Page 407, lines 5-8 (Transcript), by the State:

"Q. Did the fact that you learned that he was there in one of those rooms while you were taking the tour - that is he being Mr. Fisher - did that in any way affect your vote and the outcome of the case?

A. No sir."

Cross-Examination of Terrance A. Ryan, at Page 411, lines 3-23 (Transcript):

"Q. Before you went over, you had heard the testimony here that morning where he said he'd been in jail since April 1?

A. Yes sir.

Q. So that you already knew he was over there?

A. Yes sir.

Q. And this was sort of an impulsive thing, that you just decided, some of

you, that you had a long lunch hour, and this would be a good time to see the new building, is that it?

A. Right. I worked on it, and I kind of wanted to see it up close.

Q. So that the whole going in there was rather inadvertent, is that it?

A. Yeah. We was just trying to kill time.

Q. Did the fact that you learned that he was there in one of those rooms while you were taking the tour -- that is he being Mr. Fisher -- did that in any way affect your vote in the outcome of the case?

A. No sir.

Q. This deputy that you first saw, he wasn't anyone that testified or anything, was he?

A. No sir.

Cross-Examination of John Wolfe, at Page 415, lines 16-19 (Transcript):

"Q. Did the fact that it was mentioned of him being held in a particular room there have any effect whatsoever on your vote on the outcome of the case?

A. No sir."

Cross-Examination of Martha Ann Lynn, at Page 419, lines 7-10 (Transcript):

"Q. Did the fact it was mentioned to you he was being held waiting lunch break in that one particular room, did that have any effect whatsoever upon your vote and the outcome of the case?

A. No sir, it did not."

Direct examination of Theresa Bell, at Page 421, lines 19-25 (Transcript), by Defense Counsel:

"Q. Okay, now, have you ever seen any body in jail before?

A. No.

Q. That's the first time you had a chance to do something like that?

A. (Witness indicated yes by nodding head).

Q. Did that have a little bit of an impact on you?

A. No."

Cross-Examination of Theresa Bell, at Page 424, Lines 23-25 (Transcript):

"Q. It no way affected your decision about the case at all?

A. No, I didn't think anything about it until they mentioned that."

The Appellant filed a Motion for a New Trial on October 5, 1976, and hearing was held thereon on October 7, 1976. The Trial Court rendered its written opinion on October 8, 1976, made part of the Record herein, finding that there had been no affirmative showing by the evidence of any prejudice having resulted to Appellant.

Following the judgment and sentencing of Appellant in the Common Pleas Court of Muskingum County, Ohio, Appellant thereafter perfected his appeal to the Court of Appeals of Muskingum County, Ohio, Fifth Appellate District, raising therein by assignment of error the same question

now raised herein. The Court of Appeals affirmed the judgment of the Trial Court on May 26, 1977. Further appeal was thereafter perfected to the Supreme Court of Ohio wherein the Motion for Leave to Appeal was overruled on September 29, 1977.

II

ARGUMENT

An examination of several recent decisions, both State and Federal, bearing upon similar issues arising out of Jury misconduct, amply demonstrates that no substantial Federal question is raised by Appellant herein.

Where Jurors have had the opportunity to observe the Defendant in handcuffs, shackles, or prison garb, the authorities have clearly refused to find any prejudice resulting therefrom where the Jury was already aware of the Defendant's confinement.

As specifically set forth by the United States Supreme Court in Estelle v. Williams, 425 U. S. 501, 507, 48 L. Ed. 2d 126, 132 (1976):

> "No prejudice can result from seeing that which is already known." Quoted from United States ex rel Stahl v. Henderson, 472 F. 2d 556, 557 (5th

Cir. 1973), cert. den. 411 U. S. 971, 36 L. Ed. 2d 694 (1973).

The Court upheld the conviction in the Estelle case, where the accused had been tried before a Jury while dressed in prison clothes, the Court noting that the offense for which the Defendant had been convicted was committed while confined in prison, the Court stating that "when for example the accused is being tried for an offense committed in confinement ... courts have refused to find error in the practice." Estelle v. Williams, supra, at 132.

In the case of United States ex rel Stahl v. Henderson, supra, the Defendant, convicted of murdering a fellow inmate at prison, appeared at trial in handcuffs, shackles, and a striped prison uniform, with armed guards in the court-room. In upholding the conviction, the Court stated that "[t]he jury necessarily knew that he was a prison inmate both at the time that he was alleged to have committed the crime and at the time of his trial." (Emphasis supplied) Id, at 557.

The Courts have further distinguished those situations involving a brief and fortuitous encounter with the Defendant, especially one occurring somewhere other than in the courtroom.

> "... a brief and fortuitous encounter of the defendant in handcuffs by jurors is not prejudicial and requires an affirmative showing of prejudice by the defendant."
>
> Wright v. Texas, 533 F. 2d 185, 187 (5th Cir. 1976).

In United States v. Crane, 499 F. 2d 1385 (6th Cir. 1974) cert. den. 419 U. S. 1002, 42 L. Ed. 2d 278 (1974), the Court, in upholding the conviction, held that the Defendant suffered no prejudice from the brief encounters with Jurors in the hall of the Courthouse while he was shackled, and the District Court did not err in denying Defendant's Motion for a mistrial. The Court, referring to its earlier opinion in Kennedy v. Cardwell, 487 F. 2d 101 (6th Cir. 1973), cert. den. 416 U. S. 959, 40 L. Ed. 2d 310 (1974), stated that, unlike incidents

occurring in the courtroom during trial, a somewhat different standard was applicable in those cases "where the defendant had been seen by jurors in shackles only for a brief period somewhere in the courthouse." United States v. Crane, supra, at 1389.

> "The degree of prejudice to the defendant in this situation is certainly much less than in the situation where the accused sits throughout his trial before the jury in shackles."
>
> Kennedy v. Cardwell, supra, at 109.

In Kennedy, the Court pointed out that "[t]he majority of cases ... state that such a brief and fortuitous incident is not prejudcial and requires an affirmative showing of prejudice by the Defendant." (Emphasis supplied) Id, at 109. In approving the use of restraints upon the Defendant during trial, in light of his previous escapes, the Court noted that it was inevitable that the Jury would learn of these escapes at the trial anyhow.

In a State Court Opinion, upholding the conviction of an accused who had been led in handcuffs through the Courthouse hallway where Jurors were standing, the Court stated:

> "It is a normal and regular as well as highly desirable and necessary practice to handcuff prisoners when they are taken from one place to another, and the jury is aware of this." (Emphasis supplied) State v. Neely, 524 S. W. 2d 886, 887 (Mo. App. 1975), quoting from United States v. Leach, 429 F. 2d 956, 962 (8th Cir. 1970).

Another State Court similarly held no prejudice shown where the Jury viewed a Defendant in handcuffs, either while in custody outside the Courtroom itself or while being transferred to and from the Courtroom. Brookins v. State, 354 A. 2d 422 (Del. Sup. Ct. 1976)

In the case at bar, prior to the inadvertent and fortuitous incident in the County Jail, the

Jurors heard the Appellant acknowledge under direct examination by his own Attorney that he had already spent a substantial portion of his life in confinement and that he was currently incarcerated in the Muskingum County Jail. The Jury was, therefore, aware of his present confinement, and also aware that it was both normal and necessary that he be confined between his appearances in the Courtroom during the Trial. The testimony of the Sheriff Deputies and the Jurors themselves clearly demonstrate that the inadvertent view of the Appellant in his jail cell during afternoon recess was both brief and completely unintentional. Certainly, such incident, completely removed from the Courtroom proceedings, both as to time and place, was not prejudicial to the Appellant as having affected his right to a fair trial under due process of law.

As to those cases involving misconduct of Jurors by association with prosecution witnesses or Court officials, it has clearly been held that an improper remark by a Bailiff to a Juror is not

prejudicial error where the Juror testified that such conversation in no way influenced his participation in the case. United States v. Brumbaugh, 471 F. 2d 1128 (6th Cir. 1973), cert. den. 412 U. S. 918, 37 L. Ed. 2d 144 (1973), reh. den. 414 U. S. 1033, 38 L. Ed. 2d 326 (1973). Where convictions have been reversed, however, due to association between Jurors and prosecution witnesses, the United States Supreme Court has done so on the basis of extensive association between Jurors and key prosecution witnesses occurring throughout the course of the entire trial. Gonzales v. Beto, 405 U. S. 1052, 31 L. Ed. 2d 787 (1972). This Court has specifically stated that "association with the jury by a witness whose testimony was 'confined to some uncontroverted or merely formal aspect of the case for the prosecution' would hardly present a constitutional problem, and ... that a mere 'brief encounter' by chance, with the jury would not generally contravene due process principles." Id, at 788.

In the instant case, not one Deputy Sheriff

testified for the prosecution, nor was there any extensive association between the Jurors and Sheriff Deputies. The brief incident certainly raised no question affecting the substantial rights of the accused to a fair trial, and all Jurors, when later examined on voir dire, clearly demonstrated that such incident in no way influenced their deliberations upon the case.

No affirmative showing of prejudice by the Appellant appears from the Record in this case.

III

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Ohio.

Respectfully submitted,

RICHARD E. BRIDWELL
Prosecuting Attorney
Muskingum County, Ohio
28 North Fourth Street
Zanesville, Ohio 43701
(614) 454-0111
Attorney for Appellee

CERTIFICATE OF SERVICE

PERSONAL SERVICE

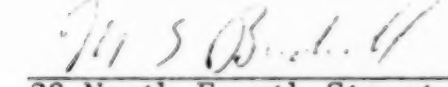
I, RICHARD E. BRIDWELL, a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Ohio, Appellee herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Motion to Dismiss or Affirm Appeal on each of the parties herein as follows:

On Howard S. Zwelling, Attorney for the Appellant, by delivering the copies thereof to his office located at 421 Main Street, Zanesville, Ohio, on the 6th day of April, 1978.

All parties required to be served have been served.

Dated: April 6, 1978.

RICHARD E. BRIDWELL
Prosecuting Attorney
Muskingum County, Ohio



28 North Fourth Street
Zanesville, Ohio 43701
(614) 454-0111